null and void in which event, PMC shall refund the said deposit to CEH free of interest and neither party shall have any further claim against the other whatsoever.

It should be stressed that clause 3 provides for rescission or cancellation of the Share Agreement by mutual consent of both parties.

In this case, there is not the slightest evidence that the Share Agreement had been rescinded or cancelled by consent of both parties or by either party. From the way both parties presented their respective cases, it is clear that the Share Agreement had not been rescinded or cancelled by either or both of them. In the circumstances, it is premature for the Court to make an order for forfeiture or refund of the said deposit.

By way of conclusion, it is my view that the two Agreements are interdependent in the sense that one party agreed to purchase the land from the other at a certain price if the other party agreed to purchase the shares from the first party at a certain price. But in respect of each Agreement, its terms and conditions must independently be complied with. Rescission of the Land Agreement, in my view, does give a right to the second defendant to rescind the Share Agreement but rescission of the Land Agreement does not automatically terminate the Share Agreement.

It is my finding of facts that the failure to obtain the necessary approval for the proposed extension of the hospital was not due to the fault of the plaintiff. The plaintiff had done the needful to obtain the approval but was not successful. The plaintiff had lawfully rescinded the contract and is therefore entitled to the refund of the deposit of RM705,672 paid by them to the first defendant with interest at 8% from 22 October 1985 to the date of realisation. I so order.

I am not making any order for forfeiture of the deposit of RM187,500 because, first, that is not pleaded by the plaintiff; and secondly, because there is no evidence that the Share Agreement had been rescinded,

I also dismiss the Defendant's counter-claim for the refund of the deposit of RM187,500 on the ground that the Share Agreement has not been rescinded yet.

Costs to the plaintiff.

RAKYAT FIRST MERCHANT BANKERS BHD.

v.

DYMM TUNKU NAJIHAH BTE TUNKU BESAR BURNANUDDIN & 4 ORS.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. C92 OF 1992]
30 SEPTEMBER 1992

EVIDENCE: Without prejudice communications - Acceptance of notice of intention to proceed without prejudice - Whether permissible - Principles applicable.

PRACTICE AND PROCEDURE: Application to strike out writ and statement of claim on the ground of inordinate delay in prosecuting the action - Order 34 r. 2 RHC 1980 - Principles applicable - Dismissal of action for want of prosecution - Order 25 r. 1(4) RHC 1980 - Principles applicable.

The third defendant was sued on a guarantee for a loan granted by the plaintiff. The writ was issued against the third defendant on 16 January 1982. He entered appearance and filed his defence on 20 February and 26 March 1982 respectively. On 16 October 1989 the plaintiff filed a notice of intention to proceed, service of which was accepted by the third defendant, without prejudice, on 18 October 1989.

On 8 December 1989 the plaintiff served a summons for direction which was heard on 15 December 1989 at which time *inter alia* the following orders were made:

(1) The lists of documents are to be served and exchanged within 30 days as verified by affidaviits.
(2) There shall be inspection of such document within 21 days of service of such lists.
(3) the suit was to be set down for trial within 60 days.

The suit was thus to be set down for trial by 15 February 1990. It was only on 21 September 1990 that the notice setting the suit down for trial was filed. On 30 March 1990, the third defendant applied to strike out the writ and statement of claim on the grounds that there was inordinate delay in prosecuting, which application was dismissed by the SAR.

The question for the Court was whether there was inordinate delay from the time the suit was to be set down for trial, 15 February 1990, to the time the third defendant filed his application, 30 March 1990. The Court further went on to consider whether the third defendant was entitled to apply to dismiss the action for want of prosecution under O. 25 r. 1(4) RHC 1980.

Held:

[1] Order 34 r. 2 relates to the non-setting down of an action for trial and the relevant period for calculating would be from the last date the plaintiff had been ordered to set the action down for trial to the date of the filing of defendants application that is 45 days, and this did not amount to inordinate delay bearing in mind the suit was commenced in 1982 and nothing was done by the third defendant until 30 March 1990, to challenge the paintiff's dilatoriness in this matter.

[2] "Without prejudice" privilege covers only communication for the purposes of settlement of dispute. Since the notice of intention to proceed and the summon for directions do not amount to communication for the purposes of settlement, there is no basis for the privilege. By participating without objection to the hearing of the summons for directions, the third defendant had, by his conduct, waived any delay that may have been occasioned by the plaintiff.

[3] The period of 7 years and 6 months, from the time the defence was filed to the filing of the notice of intention to proceed amounts to inordinate delay, but the delay was excusable as the plaintiff was attempting to foreclose on property which had been charged to them by the borrower of which the third defendant was a director. Their inability to do so was because of the delaying tactics practised by the borrower of which the third defendant must be assumed to have knowledge.

[4] The liability of the borrower was not disputed by the third defendant whose liability was founded on the guarantee he executed in respect of facilities granted by the plaintiff to the borrower. Proof of the third defendant's liability was confined to documentary evidence and to that extent the delay that had occurred since the filing of these proceedings will not be in any way prejudicial to him.

[Third defendants appeal dismissed with costs].

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 6, O. 25 r. 1(4), O. 34 r. 2(1) & (2)

For the plaintiff - Benjamin Dawson; M/s. Nik Hussin & Partners

For the third defendant - T. Sivaloganathan; (Charanjit Singh with him) M/s. C.S. Saini & Associates

JUDGMENT

Siti Norma Yaakob J:

The third defendant in these proceedings is sued on a guarantee dated 30 June 1980, together with 4 other co-guarantors in respect of a loan of $1.8 million granted by the plaintiff to a company known as NKM Properties Sdn. Bhd. (the borrower), of which the third defendant was a Director at the material time. The borrower is not cited as a party to these proceedings.

The writ was issued against the third defendant on 16 January 1982, to which he entered appearance on 20 February 1982, and he filed his statement of defence on 26 March 1982. No further step was taken against the third defendant after that date until 7 years and 6 months later, on 16 October 1989, when the plaintiff filed a notice of intention to proceed under O. 3, r. 6. Service of such a notice was accepted by the third defendant without prejudice, on 18 October 1989. On 8 December 1989, the plaintiff served a summons for directions on the third defendant and the summons was heard by the Senior Assistant Registrar on 15 December 1982, wherein various orders were granted as to the future conduct of the proceedings with a view to the whole case being heard and determined.

Then on 30 March 1990, the third defendant filed an application to have the writ and statement of claim struck out on the ground of the inordinate delay of the plaintiff to prosecute the action. The application was, however, dismissed with costs by the Senior Assistant Registrar on 25 September 1990, and dissatisfied, the third defendant appealed to me.

The first issue taken is the nature of the application itself. It is clear from the summons that the application is made under O. 34, r. 2, of the Rules of the High Court 1980, and under the inherent jurisdiction of the court. Order 34 deals primarily with the setting down for trial of all actions begun by writ. O. 34, r. 2(1), identifies the period when the plaintiff should

set an action down for trial in the following manner:

> Every order made on a summons for directions shall fix a period within which the plaintiff is to set down the action for trial and must contain an estimate of the length of the trial and the approximate number of witnesses, if any.

Order 34, r. 2(2), goes further to state the position where the plaintiff fails to comply with r. 2(1) by the following words:

> Where the plaintiff does not, within the period fixed under paragraph (1), set the action down for trial, the defendant may set the action down for trial or may apply to the court to dismiss the action for want of prosecution and, on the hearing of any such application, the court may order the action to be dismissed accordingly or may make such order as it thinks just.

Thus under O. 34, rule 2, the delay complained of must occur at the stage when the action is ready for trial by the plaintiff seeking directions for trial and that time only starts to run from the time directions for trial are given and that delay can only occasion by any act done or omitted to be done in accordance with the directions given in the summons for directions. Thus any delay occasioned before the filing of the summons for directions is immaterial for the purpose of O. 34, r. 2.

In these proceedings, the plaintiff filed the summons for directions on 8th December 1989, and a week later, on 15th December 1989, in the presence of Counsels acting for both the plaintiff and the third defendant, the following orders were made:

(1) The plaintiff and the third defendant had, within 30 days of the order, to serve and exchange their lists of documents and to verify such lists by the filing of affidavits.
(2) There shall be inspection of such documents within 21 days of service of such lists.
(3) The estimated length of the trial is 2 days with 4 witnesses for both the plaintiff and the third defendant and the suit is to be set down for trial within 60 days of the order.

This would mean that the plaintiff and the third defendant had until 15 January 1990, to serve and exchange their lists of documents, after which there will be inspection culminating in the suit being set for trial by 15 February 1990. Needless to say, the orders were not adhered to within the time limited, as the plaintiff only filed and verified their list of documents on 23 August 1990, and the notice setting the suit for trial was only filed on 22 September 1990. As for the third defendant, he failed to serve the list of documents altogether but, instead, filed the application to strike out the writ and statement of claim for want of prosecution, on 30 March 1990.

Under such circumstances, what is the length of the delay occasioned by the plaintiff as at 30 March 1990? As O. 34, r. 2, relates to the non-setting down of an action for trial, the relevant period for calculating would be from 15 February 1990, the last date when the plaintiff had been ordered to set the action down for trial, to 30 March 1990, the date of the filing of the third defendant's application under O. 34, r. 2. That would be 45 days, and the next issue to consider is whether 45 days amount to inordinate delay.

In my opinion it is not, bearing in mind that this suit was first commenced in 1982, and nothing was done by the third defendant until 30 March 1990, to challenge the plaintiff's dilatoriness in this matter.

In this respect, it must be remembered that the third defendant never questioned the plaintiff's dilatoriness before 30 March 1990. In fact, at the hearing of the summons for directions, the third defendant who was represented by his Counsel, never challenged or questioned the orders asked for in the summons for directions, but appears to have gone along with the plaintiff to have the orders sought for.

However, in fairness to the third defendant, he did accept service of the plaintiff's notice of intention to proceed without prejudice, and before me, he argues that all proceedings following such acceptance are also participated on a "without prejudice" basis.

Communications between opposing parties in a dispute based on a "without prejudice" basis take place when letters are written or oral communications are made for the sole purpose of settling the dispute. For that very reason, such communications are generally inadmissible as evidence, should it later transpire that the dispute cannot be settled. This privilege

exists to cover only communications, written or oral, and has relevance to any proceedings in a court of law. Since the notice of intention to proceed and the summons for directions do not amount to communications for the purpose of settlement, there is no basis for the third defendant to hold on to his action for accepting the notice of intention to proceed without prejudice. On the contrary, by participating without objection to the hearing of the summons for directions, the third defendant had, by his very conduct, waived any delay that may have been occasioned by the plaintiff.

In any event, the third defendant's conduct after 15 December 1989, is also questionable, as he failed to comply with the orders given in the summons for directions to serve, exchange and verify his list of documents with the plaintiff altogether. Under those circumstances, the court cannot entertain the third defendant's complaint of omission committed by the plaintiff when he too has been guilty of the same.

The third defendant has also invoked the court's inherent power to have the plaintiff's suit struck out for want of prosecution, but in this matter, since the court is sufficiently empowered by O. 34, r. 2, to deal with such an application, I consider that it is redundant for the plaintiff to invoke the court's inherent power to determine its application.

If at all there is any delay in the prosecution of this suit, this must surely be the period of inactivity after the statement of defence was filed on 26 March 1982, right up to the plaintiff's notice of intention to proceed filed on 16 October 1989. During this period of 7 years and 6 months, there was no other interlocutory matters that needed to be dealt with and the plaintiff should have, with due diligence after the statement of defence was filed, proceeded to file the summons for directions to secure the expeditious disposal of this suit, Since this was not done, the third defendant could, during the period of inactivity, apply to dismiss the action for want of prosecution under O. 25, r. 1(4). Although the third defendant's application is not expressly founded under O. 25, r. 1(4), nonetheless, I shall, for the purpose of determining the allegation of delay occurring after the filing of the third defendant's statement of defence and the notice of intention to proceed, assume that it was so made under the said order and rule.

For the third defendant to succeed in his application, he must show:

(1) that the delay has been inordinate;
(2) that it is inexcusable; and
(3) that he has been seriously prejudiced by the delay.

There can be no denying the fact that a period of 7 years and 6 months amounts to inordinate delay, but whether such delay is excusable or not depends on the facts of each case.

In his statement of defence, the third defendant has pleaded that the plaintiff should exhaust their remedy by foreclosing on the charged property, and since the value of the property is substantial, the proceeds realised would be more than sufficient to cover the amount due to the plaintiff, thereby releasing the third defendant of his liability under the guarantee he executed.

This must have also been in the contemplation of the plaintiff as, 4 days before the writ of summons was filed in these proceedings, the plaintiff had also commenced foreclosure proceedings against the borrower on 12 January 1982, in Kuala Lumpur originating summons No. F32/82. The originating summons was fixed for hearing on 5 March 1982, but after 2 adjournments at the instance of the chargor, the order for sale was made on 7 December 1982, with the auction to be held within 6 months of that date. Dissatisfied with the order for sale, the chargor applied for further arguments into open court on 9 December 1982, but a certificate that no further arguments were required was duly issued on 17 May 1983. In the meantime, the plaintiff had filed a summons for directions, seeking various orders on the conduct of the auction to be held, whilst the chargor also applied for a stay of all further proceedings on the originating summons, pending their application for further arguments into open court. A stay was granted on 12 May 1983, and since no further arguments on the originating summons was allowed, the chargor filed a notice of appeal against the order of sale to the then Federal Court.

The Federal Court heard the chargor's appeal on 12 January 1984, by dismissing it with costs. On 10 February 1984, the chargor filed a notice of motion for leave to appeal to his majesty the Yang Di Pertuan Agong and for a

stay of all proceedings pending their appeal to the Privy Council in England.

The Federal Court dismissed the chargor's motion with costs on 20 February 1984, thereby paving the way for the plaintiff to proceed to obtain directions for the auction of the property.

Three adjournments followed the hearing of the summons for directions and this was due to the opposing valuations placed on the charged property for the purpose of fixing the reserve price. In any event, the auction was fixed for 29 January 1985, at the reserve price of RM11,550,000, but the auction did not take place, as a few days before the auction, various objections were raised by the chargor on the presence of 3 caveats on the charged land, that the auctioneer appointed to conduct the auction was not a licensed auctioneer and that the proclamation of sale was defective.

A second auction date was fixed for 17 May 1985, but 2 days before the auction, the chargor succeeded in obtaining an *ex-parte* order, staying all proceedings in the originating summons pending a determination of another originating summons filed by the chargor in the Seremban High Court No. F866/85 against the Registrar of Titles, Seremban, to remove the caveats lodged on the property. The Seremban originating summons was only heard on 25 October 1985, when an order was granted to remove the caveats, thereby paving the way for the plaintiff to proceed with the auction.

The plaintiff were prevented from doing so, as the chargor had pre-empted such move by filing a suit, Kuala Lumpur High Court Suit No. A20/85, against the plaintiff on 26 September 1985, for a declaration that the power of attorney executed by the plaintiff and used by their attorney, to execute the charge was null and void for want of registration under the Powers of Attorney Ordinance 1949 and/or for fraud, forgery or false pretence. The purpose of filing this suit was clearly to defeat the charge and stall the auction, although the same had already been determined by the Federal Court.

The plaintiff filed their statement of defence in suit A20/85 on 22 November 1985, and a day later, the chargor filed an application to strike out the plaintiff's defence. The plaintiff retaliated by filing an application to strike out the chargor's writ and statement of claim on 29 November 1985. Both applications were heard in open court on 26 February 1986, when the plaintiff succeeded in striking out the chargor's writ and statement of claim.

The chargor then filed a notice of appeal to the Supreme Court, which dismissed the appeal with costs on 11 February 1987, and thereby clearing all obstacles for the plaintiff to proceed with the auction of the property.

At a hearing of the plaintiff's summons to reduce the reserve price on 27 March 1987, and 6 May 1987, the reserve price was reduced to RM8,250,000 with the consent of all parties and a third auction date, 4 September 1987, was given when the auction was aborted as there were no bidders. Eight successive auctions then followed, each time at a reduced reserve price, between the period 13 January 1988, to 12 June 1990, with reserve price ranging from RM7,400,000 to RM4,030,000, but all proved abortive as there were no bidders. Realising that their attempts to sell the charged property were futile, the plaintiff had, on 20 November 1989, filed the summons for directions in these proceedings before setting the matter for trial.

From the events that I have narrated, it is very clear that the chargor spared no effort to drag the foreclosure proceedings. The chargor is the borrower, of which the third defendant was a director at the material time. As the person most interested in the outcome of the auction, the third defendant must be assumed to be aware of the delaying tactics practised by the chargor and that the delay that occurred was in no way initiated by or contributed to by the plaintiff. They have done everything to have the charged land auctioned but the fact that they had failed due to lack of interest by bidders, cannot be faulted against them. In all cases of want of prosecution, it must be shown that the party at fault did nothing. In this case the plaintiff did everything to benefit the third defendant.

In this respect, the third defendant had also questioned the plaintiff's conduct in not proceeding with the suit between 1986 and 1989, following the decision reached in *BBMB v. Esah bte. Abdul Ghani* in 1986, and contends that such delay is inexcusable.

lt must be remembered that during this period the auction was still being actively pursued by the plaintiff and during that period, no less

than 7 auctions were conducted which all proved to be abortive as there were no bidders. Prior to 1986, the decision of *Ng Yik Seng & Anor. v Perwira Habib Bank Malaysia Berhad* was good law but after 1986, the plaintiff did prosecute this action by filing a notice of intention to proceed against the third defendant's co-guarantor, the fourth defendant in these proceedings. In any event, during the period of 1986 - 1989, if the charged property had been auctioned off, the proceeds would be more than sufficient to relinquish the third defendant's liability under the guarantee. The third defendant was all too aware of this and had pleaded so as his defence. As such, he cannot now complain that by not prosecuting this action until 1989, his position had been jeopardised.

The third defendant's liability is founded on the guarantee he executed on 30 June 1980, in respect of facilities granted by the plaintiff to the borrower. The liability of the borrower as the principal debtor has been established, as seen from the foreclosure proceedings and is in no way disputed by the third defendant. As such, proof of the third defendant's liability is confined to documentary evidence and to that extent, the delay that had occurred since the filing of these proceedings will not be in any way prejudicial to him. In any event, he can claim contribution from his co-guarantors.

The fact that he is a public figure threatened by this action above his head, is neither here nor there, for as a public figure, the third defendant must all be too aware of the consequences of his action in consenting to be a guarantor in the first place. On the facts of this case, I consider that the third defendant had not been in any way prejudiced by the long delay that had occurred.

For the reasons that I have given, I had accordingly dismissed the third defendant's appeal with costs.

THE BOARD OF TRUSTEES OF THE ATHI EESWARAN TEMPLE

v.

P. SANTHIRASEGARAM

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. S7-22-726-1990]
15 MAY 1992

PRACTICE & PROCEDURE: Interlocutory injunction - Order of court granting interlocutory injunction - Application to set aside and for ancillary reliefs granted - Whether application for reliefs in respect of prayers (ii) for damages and (iii) for injunction should have been entertained by the court.

The plaintiffs applied for an order by way of summons-in-chambers (ex-parte) on a certificate of urgency for an interlocutory injunction to prevent the defendant, the president of the board of trustees of the Eeswaran Temple, from threatening their members, entering their office or carrying out their functions, and an interlocutory mandatory injunction that the defendant unlock the plaintiffs' office and return all documents and other things taken from the office and return all documents and other things taken from the office. The application was supported be an affidavit affirmed by one Patmanathan a/l Ayadurai ('A Pathmanathan'), who claimed to be the honorary secretary of the plaintiffs. An order dated 28 November 1990 in terms of the application was granted, with liberty for the defendant to set aside the order within 14 days.

The plaintiffs duly filed their writ and statement of claim dated 30 November 1990 for a permanent injunction and damages against the defendant.

On 11 December 1990, the defendant filed an application by way of summons-in-chambers to set aside the order dated 28 November 1990, and for reliefs against A Pathmanathan, that

(ii) he be ordered to pay damages and expenses suffered by the defendant, that
(iii) he should cease from acting as acting as representative of the board of trustees of the Athi Eeswaran Temple, and that
(iv) he be taxed the costs of the application.

The application came on for hearing on 21 January 1991. An order in terms of the defendant's application was allowed. The plain-